CRIMINAL APPEAL.

Before Mr. Justice Trevelyan and Mr. Justice Hill.

BIKAO KHAN AND OTHERS (APPELLANTS) *v.* THE QUEEN-EMPRESS (RESPONDENT).*

1889
May 7.

Criminal Procedure Code (Act X of 1882), ss. 161, 172, 211—Statements of witnesses recorded by Police officers investigating under chap. XIV of the Criminal Procedure Code, Right of accused to call for and inspect—Police Diaries.

Statements of witnesses recorded by a Police officer while making an investigation under s. 161 of the Criminal Procedure Code, form no portion of the Police Diaries referred to in s. 172, and an accused person on his trial has a right to call for and inspect such statements and cross-examine the witnesses thereon.

IN this case five persons were committed to the Durbhangah Sessions by the Joint-Magistrate of that district to take their trial on charges framed under ss. 302, 147 and 149 of the Indian Penal Code. On the commencement of the trial in the Sessions Court, the Counsel for the accused applied to the Judge before the opening speech of the Government Pleader, to call for the statements of the witnesses for the prosecution recorded by the investigating Police officer under s. 161 of the Criminal Procedure Code, on the ground that these statements formed no part of the diary referred to in s. 172 of the Code, and that the accused were entitled to see them. Counsel stated that these statements were then in the custody of the District Superintendent of Police who might be subpœnaed to produce them without delay, so that the accused might be in a position to cross-examine the witnesses for the prosecution regarding the statements made by them to the Police. The Sessions Judge disallowed the application, on the ground that under s. 211 of the Criminal Procedure Code, the application for the production of these documents ought to have been made before the committing officer, so as to entitle the accused to call for the papers as of right. The Police officer, who had recorded the statements in question, subsequently brought them into Court of his own motion, and held them in

* Criminal Appeal No. 173 of 1889, against the order passed by A. C. Brett, Esq., Sessions Judge of Durbhangah, dated the 26th February 1889.

his hands during his examination as a witness. The Counsel for the accused then applied to the Judge to compel the production of the papers, then in Court, and to enable him to see them. This application was also refused by the Judge, who eventually convicted four out of five of the accused persons under ss. 304 and 149. As regards the non-production of the statements, the Sessions Judge made the following observations in his judgment:—

"In conclusion I would wish to make some remarks on an incident in the case before even the Government Pleader had commenced his opening address. I was asked by Mr. *Ghose* to order the production, as exhibits in the case, of the statements recorded by the Police under s. 161, Criminal Procedure Code. Mr. *Ghose* said he had with him a copy of an unreported judgment of the Calcutta High Court laying down that he was entitled to call for these documents. The point is a new one. But I am not concerned to discuss the question as to whether these papers can be treated as evidence, and whether, therefore, the defence (or the prosecution for the matter of that) can enforce their production or produce them. The question is not free from difficulty. I disposed of the application on another ground. Under s. 211 of the Criminal Procedure Code, as soon as the committing officer has framed the charge, the accused has to apply for coercive process. I hold that he is not entitled, as a matter of right, to ask the Court of Session for the issue of such process. It may be said that I should, as a matter of equitable discretion, have ordered their production, as this could be obtained without much delay. I do not think so. But even if I am wrong, no harm has been done, for I have read the statements, which I have had translated, and there is practically no difference between what the persons examined stated, and what the witnesses have deposed before both Courts. The papers were, in fact, in Court on the second day of the trial; and, indeed, Exhibit S. B. is an integral portion of them. I therefore hold (1) that the defence was not entitled to enforce their production; (2) that it was a proper exercise of my discretion to refuse to order their production; (3) that my refusal has in no way damnified the defence."

The prisoners appealed to the High Court against the conviction.

1889

BIKAO KHAN v. THE QUEEN-EMPRESS.

Mr. *Woodroffe*, Mr. *M. M. Ghose*, Mr. *M. P. Gasper* and Baboo *Saroda Churn Mitter* for the appellants.

The *Standing Counsel* (Mr. *Philips*) and Baboo *Ram Churn Mitter* for the Crown.

Mr. *Woodroffe* contended, among other matters, that there ought at least to be a new trial as the Judge had improperly disallowed Mr. *Ghose's* application, calling for the statements, and had further prevented him from reading them when they were actually before the Court. Statements recorded under s. 161 are not privileged, and form no portion of the diary referred to in s. 172. The latter is to contain a record of the proceedings of the Police and their movements, together with expressions of opinions and private matters which the Legislature probably intended should not be placed at the disposal of the parties. But it could never have been intended that the accused should be debarred from calling for the statements made by the witnesses for purposes of cross-examination, especially as under the new Code a witness is liable to be prosecuted for perjury for false statements made before the Police. This question was fully argued recently before Mitter and Macpherson, JJ., in the case of *Mahomed Ali Hadji* v. *The Queen-Empress** (Criminal Motion 422 of 1888 decided on the 30th January 1889), and those learned Judges have held that the accused were entitled to have these statements produced, and that it was an error on the part of the Magistrate not

* *Before Mr. Justice Mitter and Mr. Justice W. Macpherson.*

IN THE MATTER OF MAHOMED ALI HADJI AND OTHERS (PETITIONERS) *v.* THE QUEEN-EMPRESS (OPPOSITE-PARTY).

Mr. *M. M. Ghose* and Baboo *Jogendro Nath Bose* for the petitioner.

The *Deputy Legal Remembrancer* (Mr. *Kilby*) for the Crown.

The facts of the case are sufficiently stated in the judgment of the High Court (MITTER and MACPHERSON, JJ.) which was as follows:—

MITTER, J.—The petitioners, Mahomed Ali Hadji, Nabi Baksh, and Bazra Sonar, were charged in the Deputy Magistrate's Court of Gaibanda with being members of an unlawful assembly, on the 25th day of June last, armed with deadly weapons, and that by such unlawful assembly, force or violence was used in the prosecution of a common object: the common object being described in the charge sheet as the forcible dispossession of Budrunnissa's party from the Sultanpore cutcherry. That is, they were charged

to have compelled their production. The Police authorities themselves have recognised the distinction contended for, and have laid down in Circular No. 16, of the 28th July 1883, to all District Superintendents of Police, that statements recorded under s. 161, Criminal Procedure Code, are different from the diary.

[TREVELYAN, J.—The Police circular need not be referred to in order to explain the law. It is no authority. But we are satisfied that the law is clear on the subject, and that you were entitled to call for the statements, provided you asked for them in proper time.]

The Sessions Judge is quite mistaken in supposing that s. 211 of the Criminal Procedure Code has any application. Even if that section applied, as a matter of sound discretion, the Judge ought to have granted Mr. *Ghose's* application.

under the first count with rioting and being armed with deadly weapons under s. 148 of the Indian Penal Code. In the second count, they were charged under s. 326, coupled with s. 149, of the Indian Penal Code, it being stated that, in the prosecution of the common object of that unlawful assembly, grievous hurt was inflicted by some of the members of that assembly. The facts, as found by the Deputy Magistrate, are as follows :—One Kheraj Ali Chowdhry was the owner of Sultanpore estate, and had his family dwelling-house in the village of that name. He had also a cutcherry-baree in it. He died some time in the month of Kartick 1294, and the death of his widow Asmutunnissa followed within a few days. Moazum Hossein Chowdhry of Shibganj, a brother of Asmutunnissa, claimed the whole estate left by Kheraj Ali, on the ground that it had been transferred by Kheraj Ali in his lifetime to his wife Asmutunnissa. Upon this allegation, Moazum Hossein had obtained a certificate under Act XXVII of 1860 to collect the debts due to the estate of Asmutunnissa. With the assistance of two leading ryots in the village of Sultanpore, *viz.*, Kedar Ali Mir, a witness examined on behalf of the prosecution, and Noimuddeen Pundit, Moazum Hossein succeeded in obtaining possession of Sultanpore with the cutcherry-baree in it. But in Bysack last, these two men went over to the party of one Budrunnissa. Budrunnissa is the paternal aunt of Kheraj Ali. She and others denied the allegation of transfer of his whole estate by Kheraj Ali to his wife, and claimed either the whole or a portion of it as heirs-at-law of Kheraj Ali. As usual, in these cases, both parties struggled to maintain possession by force. The Deputy Magistrate found that the possession by Moazum Hossein of the cutcherry at Sultanpore, with the assistance of the two leading ryots mentioned above, was main-

1889

BIKAO KHAN v. THE QUEEN-EMPRESS.

[TREVELYAN, J.—As at present advised we are with you on this point.]

Mr. *Woodroffe* then proceeded to argue the case on its merits.

The *Standing Counsel*, in support of the conviction, conceded that the accused probably had a right to call for the papers, and to look at them, but they were not prejudiced as the Judge had himself looked at them, and given the accused the full benefit of their contents.

tained up to Bysack last, but on these two men going over to the other side that possession was lost and Budrunnissa's servants occupied the cutcherry-baree from that time and were in occupation of it at the time when the riot took place at the cutcherry-baree; that on the date mentioned in the charge, *viz.*, on the 25th day of June last, a body of latials headed by the petitioners came on behalf of Moazum Hossein to the cutcherry-baree, attacked the men occupying it, and inflicted injuries with spears on four persons, Hyat Mahomed, Boli Sheikh, Kedar, and Dalch, servants of Budrunnissa. This attack was made in the latter end of the night on that date, but Budrunnissa's party soon collected men in sufficient numbers to repel the attack, and the assailants were pursued up to another cutcherry-baree in a village called Mujlispore, distant about three or four miles from Sultanpore, in which a cutcherry-baree had been erected by Moazum Hossein sometime about the month of Bysack, when his people were ejected from the cutcherry-baree at Sultanpore.

Upon these facts, found by the Deputy Magistrate, the petitioners before us have been convicted of the offence of rioting, and of the offence of committing simple hurt, it being not proved that the injuries inflicted amounted to grievous hurt. It may be mentioned here that some of the men forming the attacking party were also wounded during the riot, and one of them has since died in hospital.

Each of these petitioners has been sentenced to two years' rigorous imprisonment. The witnesses for the prosecution were examined on the 5th and 6th of July last. On this last-mentioned date, the two charges mentioned above were framed against the petitioners. The witnesses were fully cross-examined by the pleader engaged on behalf of the petitioners before these charges were framed. The case was then fixed for trial on the 17th of July, but it was postponed in consequence of Counsel from Calcutta, who was engaged on behalf of the petitioners, not arriving on that date. It was taken up on the following day, *viz.*, on the 18th. In the meantime, certain witnesses had been cited by the petitioners to establish their defence, but none of the witnesses for the prosecution had been cited to be re-called.

On the 18th of July, when the case was taken up, the Counsel for the petitioners put in the witness-box the Inspector of Police of Sadullapore,

The judgment of the High Court (TREVELYAN and HILL, JJ.) was as follows:—

In this case the prisoners have been convicted by the Sessions Judge of Durbhangah, agreeing with one of the assessors, of offences under s. 304, read with s. 149, and under s. 147 of the Penal Code.

They have appealed to this Court, and Counsel on their behalf has urged that the evidence does not justify their conviction, and that even if the evidence, as given, would justify a conviction, the accused have been so prejudiced by the action of the Judge in excluding evidence which ought to have been admitted, that they are entitled to a new trial.

who was conducting the prosecution in this case, and it appears from the drift of the examination that the Counsel intended to establish that four of the witnesses examined on behalf of the prosecution, *viz.*, Hyat Mahomed, Boli Sheikh, Kedar, and Dalch, who had received injuries in the course of the riot, had given evidence before the Police officer who investigated the case under s. 161 of the Criminal Procedure Code, not agreeing with the version of the story told by them at the trial.

It appears from the examination of the aforesaid Inspector that these four men had at first denied that they were sleeping in the cutcherry on the night when the riot took place, but that they subsequently admitted that fact on being further questioned by the investigating Police officer. Upon some points the Inspector, from his memory, could not answer the questions put to him by the Counsel for the defence regarding the statements made by these witnesses. Thereupon an oral application was made by the Counsel for the production of the diaries kept by the investigating officer. A note made by the Court of this application, and the order made thereupon is to the following effect:—"Mr. *Gregory* asks the Court to require the Inspector to produce the diaries, and as I find the witness has admitted almost everything required by the defence, and because Police diaries cannot be used as evidence, nor can they be called for by the accused, the Court declines to call for the diaries at the instance of the Counsel for the defence." This evidence of the Inspector was taken on the 18th July. There were some more witnesses examined on behalf of the defence on the next day, and the trial was concluded, but judgment was reserved and not delivered till the 27th of July. On the 20th of July, we find that an application was made on behalf of the petitioner before us, embodying the purport of the oral application made by Counsel on the 18th of July referred to above. In this application, it was stated that the four witnesses, Hyat Mahomed, Boli Sheikh, Kedar, and Dalch, had made statements to the Police Inspector contrary to those which

1889

BIKAO KHAN v. THE QUEEN-EMPRESS.

We consider that the Judge has wrongly excluded evidence which he ought to have admitted.

A Police officer in this case had, under the provisions of s. 161 of the Criminal Procedure Code, examined persons who were afterwards called as witnesses.

At the Sessions trial this Police officer was in Court, and had with him the statements which he had taken down.

There can be no doubt that these statements would be admissible in evidence. They are not a portion of the diary, and are not protected by any enactment.

had been made by them in their depositions in Court, and that to a certain extent this fact had been established by the evidence of the Police Inspector; but it was not established to the full extent, and therefore they prayed that that portion of the Police diary in which the statements of these four witnesses had been recorded be sent for, and then after inspection of the said portion of the diaries, if it be considered proper to send for any witnesses, such witnesses might be sent for. An appeal was preferred to the Sessions Judge against the conviction and sentence passed by the Deputy Magistrate. In the petition of appeal, no point was made regarding the refusal of the Deputy Magistrate to send for the Police diary mentioned above, but it has been stated to us by Mr. *Gregory*, who appeared both in the Deputy Magistrate's Court as well as in the Court of the Sessions Judge, that this point was argued by him before the Sessions Judge. We do not find that it is dealt with by the Sessions Judge in the judgment which was recorded by him. This, however, is the principal point which has been taken before us in support of the rule which was issued in this case. In fact it forms the first and second grounds taken in the petition presented to this Court. The first ground is to the following effect:—"That the Deputy Magistrate ought to have compelled the production of the statements of the witnesses for the prosecution as recorded by the Sub-Inspector and the Inspector of Police under s. 161 of the Criminal Procedure Code. Such statements are not governed by the provisions of s. 172 of the Criminal Procedure Code, and were therefore not privileged. These statements were most material, and their production would have enabled your petitioner's Counsel to show that the witnesses were not reliable. Your petitioners' Counsel had strongly complained before the Appellate Court of the non-production of the said statements." The second ground is:—"That the petition, presented by your petitioners, clearly shows that the papers wanted were the statements of the witnesses and not the diaries, though the word 'diaries' was inaccurately used, because the Inspector had used the expression. The Deputy Magistrate ought to have called for those papers." The first paragraph, it seems to us, does not

The Judge refused to allow them to be used on the ground that the accused had not asked the committing Magistrate to allow them to be produced.

It appears from an affidavit, which has been used before us, that when the Sub-Inspector, who made the investigation, was being cross-examined, the Counsel for the accused asked the Judge to hand up the statements taken down by the witness to enable him to answer questions as to statements made by some of the persons who were called as witnesses for the prosecution. This the Judge refused to do.

accurately state what happened; the first paragraph says that an application was made for the statements of the witnesses for the prosecution, as recorded by the Inspector and Sub-Inspector of Police, under s. 161 of the Criminal Procedure Code. The fact is that what was wanted was not the statements of all the witnesses, but only the statements of the four mentioned above, *viz.*, Hyat Mahomed, Boli Sheikh, Kader, and Dalch. It may be conceded that the document that was asked to be produced was misdescribed in the petition, and also in the Judge's notes as "diaries." It appears that, from ss. 161 and 172 of the Criminal Procedure Code, what was wanted was not properly described as "diaries." Under s. 172, a diary is a privileged document, and neither of the parties has any right to ask for its production; but although in the application and in the note the document in question is described as a diary, it is sufficiently clear that what was wanted was the production of the statements, which in this case seem to have been reduced to writing, of the four witnesses mentioned above, which statements were taken by the investigating Police officer under s. 161 of the Criminal Procedure Code. It may also be conceded in favour of the petitioners that these statements could have been, under certain conditions, used as evidence in the case. For instance, they might have been used for the purpose of contradicting the witnesses mentioned above, or of contradicting the Inspector of Police under s. 145 of the Evidence Act. That being so, the Counsel for the petitioner was entitled to have an order from the Deputy Magistrate for the production of these statements. It is an error on his part to have refused the application, but it does not follow that because there is this error his judgment should be set aside. On the other hand, both under s. 537 of the Criminal Procedure Code as well as s. 167 of the Evidence Act, we cannot reverse or alter a judgment unless we are satisfied that the error in question has caused a failure of justice. Mr. *Ghose* was asked to point out in what way this error has caused a failure of justice, and he contended that, if the statements had been sent for, the petitioner would have been in a position to establish that the cutcherry-baree in Sultanpore was really in

1889

BIKAO KHAN v. THE QUEEN-EMPRESS.

We think that the Judge ought to have permitted Counsel to put the statements to the witness. There is no doubt that an accused person is entitled to call as his witness any person who is in Court, whether he has summoned him or not (see s. 291 of the Criminal Procedure Code), and there is, we think, equally no doubt that an accused may, so far as the law of evidence permits him to do so, make use of, as evidence, any document which is in Court at the trial. Before, however, we could order a new trial on

the possession of Moazum Hossein, and not in the possession of Budrunnissa; and if it was established that the cutcherry was in the possession of Moazum Hossein, then the charge would have entirely fallen to the ground because the common object of the unlawful assembly stated in that document was the forcible taking possession of the cutcherry. Now we have referred to the judgment of the Deputy Magistrate, and we are of opinion that it is not based as regards the question of possession upon any part of the depositions of the four witnesses mentioned above, *viz.*, Ilyat Mahomed, Boli Sheikh, Kedar, and Dalch. His finding upon the question of possession is mainly based, *firstly*, on the evidence of one of the two leading ryots, *viz.*, Kedar Ali, and, *secondly*, upon the circumstance that, about the time that Moazum Hossein's servants were alleged to have been ejected from the cutcherry of Sultanpore, they erected another cutcherry-baree in Mujlispore, within three or four miles from Sultanpore. With reference to this second ground, the Deputy Magistrate says that Mujlispore was a very small village, and if Moazum Hossein had been in possession of the cutcherry at Sultanpore, there would have been no necessity for erecting a new cutcherry at Mujlispore. In fact the judgment of the Deputy Magistrate was not founded on the evidence of the four witnesses, whose statements before the investgating Police officer was asked to be sent for. We are therefore not satisfied that the omission to send for these documents has in any way caused a failure of justice.

There was only one other point argued before us, *viz.*, that the sentence in this case is too severe. We have considered this point, and we are of opinion that the sentence that has been passed upon the petitioners, having regard to the nature of the offence established against them, is not too severe. We therefore discharge the rule.

MACPHERSON, J.—I agree. I further think that the statements called for would have been of no practical use to the petitioners unless they were in a position to summon the witnesses for the prosecution, and cross-examine them with reference to statements which they had made to the Police.

The statements were called for at a very late stage, when the petitioners were not entitled to have the prosecution witnesses summoned for the purpose of cross-examination.

this ground, we would have to be satisfied that injustice had been done to the accused by the exclusion of this evidence.

If it had appeared that there was a material difference between the statements made by the witnesses to the Sub-Inspector, and their statements made in Court, it would have been difficult to say that the accused had not been prejudiced by the Judge's decision on this question.

The Judge says that he has read the statements, and that there is practically no difference between what the persons examined stated and what the witnesses have deposed before both Courts. We see no reason to doubt the correctness of the Judge's statement, and if the legal advisers of the accused had seen any real ground for disputing it, they would have endeavoured to obtain the production of these statements, so that they might have been considered at the hearing of the appeal.

Taking all the circumstances into consideration, we do not think that the omission of the Judge to admit this evidence would justify us in ordering a new trial. On the mere speculation that these statements would disagree, and in face of the Judge's statement that they do not materially disagree, we could not order a new trial.

[Their Lordships then proceeded to determine the case on its merits, and ended in upholding the conviction and reducing some of the sentences.]

H. T. H. *Conviction upheld.*

APPELLATE CIVIL.

Before Mr. Justice Pigot and Mr. Justice Beverley.

KRISTO RAMANI DASSEE (APPELLANT) *v.* KEDAR NATH CHAKRAVARTI AND ANOTHER (RESPONDENTS).*

1889 *January* 16.

Set-off—Civil Procedure Code (Act XIV of 1882), ss. 233, 243, 246—Execution of assigned decree—Set-off against assigned decree partly executed.

A. B. had obtained a decree against *K.* and *T.* After the decree had been partially satisfied, *A. B.* assigned it to *D.* Prior to the date of the assignment, *K.* and *T.* had instituted a suit against *A. B.* and *D.*, and ultimately obtained a decree against both of them.

* Appeal from Order No. 381 against the order of Baboo Gopal Chunder Bose, Subordinate Judge of Bhagulpore, dated the 25th August 1888.